



1996

The Telecommunications Act of 1996 and US Media Ownership

Monroe Price

University of Pennsylvania, Mprice@asc.upenn.edu

Jonathan Weinberg

Follow this and additional works at: https://repository.upenn.edu/asc_papers



Part of the [Communication Technology and New Media Commons](#)

Recommended Citation (OVERRIDE)

Price, M. and Weinberg, J. (1996). "The Telecommunications Act of 1996 and US Media Ownership" in *The Yearbook of Media and Entertainment Law* (pp. 99-110). Oxford University Press.

At the time of publication, author Monroe Price was affiliated with Yeshiva University. Currently, he is a faculty member at the Annenberg School of Communication at the University of Pennsylvania.

This paper is posted at ScholarlyCommons. https://repository.upenn.edu/asc_papers/724

For more information, please contact repository@pobox.upenn.edu.

The Telecommunications Act of 1996 and US Media Ownership

Disciplines

Communication | Communication Technology and New Media | Social and Behavioral Sciences

Comments

At the time of publication, author Monroe Price was affiliated with Yeshiva University. Currently, he is a faculty member at the Annenberg School of Communication at the University of Pennsylvania.

directive, proposing individual licensing and general authorization illustrates some of them. How is an electronic newspaper to be classified? As another form of the printed press or as a subject of telecom licensing? The answer might determine the extent to which its content can be regulated or the entity made available or who can issue it. It could also determine who makes those regulations. In Germany, for example, it will determine whether regional or federal government decides on the appropriate controls.

The Commission's updated Action Plan²⁰ suggests that there will be many opportunities for these issue to be raised—the green paper on new audio visual services, the green paper on commercial communications, the Media Concentration Directive, directives on telecommunications, ISDN, and privacy issues, and the various communications on industrial and regulatory aspects of the new service industries, on industry, the citizen, and the information society. 1996 may show whether debate within the Information Society Forum will yield consensus or merely inject further contradictory opinions into the debate.

²⁰ Available from the Information Society Project Office, European Commission, BU 24-2/78, 200 Rue de la loi, B-1049 BRUSSELS.

The Telecommunications Act of 1996 and US Media Ownership

MONROE PRICE* AND JONATHAN WEINBERG†

I

For the first fifty years of the history of broadcasting in the United States, two models, not one, governed ownership and regulation in the electronic media. US regulators oversaw a monopoly in telecommunications (though not a State monopoly, as in European Countries). By contrast, US law provided for competition in broadcasting. While AT&T, the monopoly telephone carrier, controlled nearly all telephone traffic, US regulators established a system of competing private broadcast stations.

Technology weakened this system's underlying categories. The entry of cable television caused the traditional model of competition among local broadcast stations to lose much of its meaning. Increasingly, video programming came to be distributed through natural-monopoly cable systems, rather than through local broadcast stations. At the same time, the monopoly model for telephony came under technological and legal attack. The federal courts in the 1970s opened the door for competition in long-distance services;¹ the possibility of competition in the local loop came not long after.

By the late 1980s, regulators contemplated the possibilities that telephone companies could compete with cable and that cable could compete in providing local exchange services. The cable industry began to relax its opposition to telephone company entry into cable, as cable saw a powerful business opportunity for itself in the markets formerly reserved for telephone companies. Industry negotiators began exploring the possibility of legislation to lift the prohibitions keeping each industry out of the other's territory. The federal courts began to question the constitutionality of rules forbidding telephone companies from providing video programming, or owning cable

* Professor of Law, Yeshiva University.

† Associate Professor of Law, Wayne State University.

¹ See *MCI Telecommunications Corp. v. FCC*, 580 F2d 590 (DC Cir.), cert. denied, 439 US 980 (1978); *MCI Telecommunications Corp. v. FCC*, 561 F2d 365 (DC Cir. 1977), cert. denied, 434 US 1040 (1978).

television systems, in their telephone service areas.² It became clear that the prohibitions segregating cable television from telephone service would not survive.

In this essay, we examine traditional US thinking concerning mass media ownership. We then review recent developments, including the just-enacted Telecommunications Act of 1996. Changes in ownership regulation reveal changing understandings of the goals of media policy. Under traditional US policy, telephone companies and cable companies were kept at arm's length from each other; the law required television stations and cable systems in common viewing areas to be separately owned; and there were carefully calibrated limitations on the number of radio or television stations any one entity could hold. Almost all of that has now been swept away.

II

Traditional US thinking regarding mass media ownership and control has rested on two assumptions. The first is descriptive: it predicts that a speaker's identity will strongly influence the content of his speech. The second is normative: it prescribes that the owner of the physical communications resources—printing press, broadcast station, or whatever—used to disseminate speech should control that speech.

The first assumption posits a link between the identity of a speaker and the content of its speech. Speakers, the theory runs, tell stories reflecting their own backgrounds, identities, and views.³ Government policies affecting the identity of speakers will affect the content of those stories.

The second assumption derives from the central role of private autonomy, and property rights, in US constitutional thinking. A foundational theme of US free-speech philosophy has been that government's role in the market-place of ideas is presumptively limited to the enforcement of property rights in communications resources, and other common law support for private ordering. A crucial role of free speech, the theory runs, is to serve as a check on overreaching government;⁴ free speech is best protected from government interference and is best able to fulfill that role when the private owner of communications resources controls their use.⁵ Consistently with that vision,

² The leading decision is *Chesapeake and Potomac Tel. Co. v. United States*, 42 F3d 181 (4th Cir. 1994), vacated for consideration of mootness, 116 SCt 1036 (1996).

³ See *Metro Broadcasting, Inc. v. FCC*, 497 US 547, 569–83 (1990); Wendy M. Rogovin, 'The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard', 42 *Catholic LRev.* 51, 54–68 (1992).

⁴ See Vincent Blasi, 'The Checking Value in First Amendment Theory' [1977] *Am. B Found. Res. J.* 521.

⁵ Thus A. J. Liebling's quip: freedom of the press is guaranteed to all those who own one: A. J. Liebling, *The Press* (1975), 32.

the drafters of the 1934 Communications Act took pains to specify that a broadcast licensee 'shall not . . . be deemed a common carrier', required by law to carry programming provided by others.⁶ Indeed, the FCC for many years deemed it an abdication of a broadcaster's public-interest duty for it to relinquish legal control over the programming it broadcast.⁷

Beginning in the 1940s, US policymakers built up a set of ragged, not always articulated, understandings flowing from these two assumptions. Different media owners would provide different media voices. More owners would mean more voices. A range of owners would lead to a range of views. A multiplicity of owners would lead to competition; competition would lead to robust, open discussion. Access by speakers would be more nearly equal, in part because media outlets would be sympathetic to a wider variety of views.

The Federal Communications Commission drew on this vision in developing its concentration policies; it sought to achieve 'diversification of program and service viewpoints', and thus the preconditions for democratic discourse, by encouraging diversity in ownership.⁸ Rather than seeking to regulate speech content directly, it promulgated rules establishing what might be called an 'ownership access' policy.

The Commission began in 1938 by adopting a strong presumption against allowing two or more AM radio stations under common ownership in a single community.⁹ Within a short time, the Commission had rules in place barring the ownership in a single market of more than one station in any given broadcast service—AM, FM, or television. Until 1970, though, FCC rules still allowed a person to own an AM, an FM, and a television station in the same community. The FCC partially plugged that gap in 1970 and 1971, banning the acquisition by a single entity, in a single market, of both a radio and a VHF television station.¹⁰ The agency explained:

A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more

⁶ 47 USC § 153(h). The Communications Act itself provides some exceptions to this rule; the most important is 47 USC § 312(a)(7), requiring broadcasters to sell reasonable amounts of time to candidates for federal elective office for political advertising: see *Columbia Broadcasting System v. FCC*, 453 US 367 (1981).

The Sup. Ct. relied on s. 153(h) when, in 1979, it struck down FCC rules requiring cable systems to offer channels for public, educational, and governmental use. Those rules, the Court explained, impermissibly imposed common-carrier obligations: *FCC v. Midwest Video Corp.*, 440 US 689 (1979). Congress later revisited that issue in the Cable Communications Policy Act of 1984; see text accompanying n. 35 below.

⁷ See, e.g., *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F2d 917 (DC Cir. 1978); *Filing of Agreements Involving the Sale of Broadcast Time for Resale*, 33 FCC2d 654 (1972). The Commission largely abandoned that position in *Part-Time Programming*, 82 FCC2d 107 (1980).

⁸ *Rules and Regulations Relating to Multiple Ownership*, 18 FCC 288, 292–3 (1953).

⁹ *Genesee Radio Corp.*, 5 FCC 183 (1938).

¹⁰ *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 28 FCC2d 662 (1971) (reconsidering *Multiple Ownership*, 22 FCC2d 306 (1970)).

desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe social crisis.¹¹

The FCC relaxed its 'one-to-a-market' rules in 1989, and again in 1992. After 1992, licensees were allowed to own up to three or four radio stations in a given market,¹² and the Commission was indulgent towards requests for waiver, in large markets, of the bar on radio-VHF combinations.¹³

The FCC began in 1940 to limit the number of broadcast outlets that could be owned by a single entity in different geographical markets. Under rules promulgated in 1953 and 1954, no entity could own more than seven AM, seven FM, and seven television stations (of which no more than five could be VHF) nationwide.¹⁴ This approach, the Commission explained, would promote 'diversification of program services' without 'governmental encroachment on . . . the prime responsibility of the broadcast licensee'.¹⁵ The Commission later relaxed these rules, too, in 1984 and again in 1992. After 1992, one was allowed to own twenty AM and twenty FM radio stations nationwide.¹⁶ One could own up to twelve television stations, provided that their aggregate reach was no more than 25 per cent of the national audience.¹⁷

The most elaborate FCC articulation of the relationship of ownership to public discourse came in the context of newspaper-broadcast cross-ownership. The agency first addressed this question in 1970. In almost 100 cities, newspapers and television stations were under common control. In a few communities, the daily newspaper was under common ownership with the *only* radio or television station. The FCC determined that this concentration of ownership was inconsistent with its assumptions about democratic discourse. It banned the formation

¹¹ *Multiple Ownership*, n. 10 above, 311.

¹² *Radio Multiple Ownership Rules*, 7 FCCRcd. 6387 (1992), *on reconsideration*, 9 FCCRcd. 7183 (1994).

¹³ See *Second Report and Order*, 4 FCCRcd. 1741, *on reconsideration*, 4 FCCRcd. 6489 (1989).

¹⁴ *Rules and Regulations Relating to Multiple Ownership*, 18 FCC 288 (1953), 43 FCC 2797 (1954). The Sup. Ct. upheld the rules in *United States v. Storer Broadcasting Co.*, 351 US 192 (1956).

¹⁵ *Multiple Ownership*, n. 14 above, 293.

¹⁶ *Radio Multiple Ownership Rules*, n. 12 above. A minority owner could hold up to five additional stations in each service; a non-minority holder could hold non-controlling interests in up to five additional minority or small-business controlled stations.

¹⁷ *Amendment of Multiple Ownership Rules*, 100 FCC2d 17 (1984), *on reconsideration*, 100 FCC2d 74 (1985). UHF stations were counted at only one-half of their theoretical reach, because of the physical limitations of their signals. Minority owners could hold up to 14 stations, and non-minority owners could acquire non-controlling interests in two additional minority-controlled stations. Aggregate audience reach could be as high as 30%, provided that 5% of that reach was contributed by minority-controlled stations.

of new newspaper-broadcast combinations, and required divestiture where the owner of the sole newspaper in a community was also the owner of the sole television station, or of the sole radio station in a community that had no television station.¹⁸ It was intolerable, said the Commission, to allow such an entity an 'effective monopoly' in the local market-place of ideas. The Supreme Court affirmed; it upheld as rational the Commission's finding that 'diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints'.¹⁹

Congress and the FCC imposed cross-ownership restrictions in other areas. It was illegal for a person to control a television broadcast station and a cable system in the same market.²⁰ It was illegal for a person to control a telephone company and a cable system in the same area.²¹

Much of US broadcast regulation since 1934 was based on, and sought to reinforce, the link between ownership and content. That connection was crucial if the Commission were to pursue a policy of ownership access—if it were to bring about diversity of speech through ownership regulation. The emergence of radio networks provided one early threat to that link. The Commission initiated extensive inquiries in 1938 into the new 'chain broadcasting', reflecting its concern that binding contractual relationships made national networks the true owners of local stations rather than the local licensees. Those contractual relationships threatened the Commission's ideal of discourse driven by independent, competitive local voices. The FCC announced regulations intended to ensure the 'independence' of the local outlets, emphasizing the local broadcaster's ability to replace network offerings with programming more idiosyncratically responsive to the community of licence.²²

Later on, the Commission sought to address the link between ownership and content from a different perspective: it provided that it would grant a preference, in comparative licensing hearings, to own-

¹⁸ *Second Report and Order*, 50 FCC2d 1046 (1974), *on reconsideration*, 53 FCC2d 589 (1975), *aff'd in part & rev'd in part sub nom. Nat'l Citizens Comm. for Broadcasting v. FCC* 555 F2d 938 (DC Cir. 1977), *aff'd in part & rev'd in part*, 436 US 775 (1978).

¹⁹ *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 US 775, 796 (1978).

²⁰ 47 USC § 533(a).

²¹ *Ibid.* § 533(b). The constitutionality of that prohibition was hotly contested. See e.g. *Chesapeake and Potomac Tel. Co. v. United States*, 42 F3d 181 (4th Cir. 1994), *vacated for consideration of mootness*, 116 SCt 2374 (1996). The FCC took the position that it could waive this prohibition for telephone companies complying with its video dialtone rules. *Telephone Company—Cable Television Cross-Ownership Rule*, 10 FCCRcd. 7887 (1995).

²² See *National Broadcasting Co. v. United States*, 319 US 190 (1943). In 1977, the Commission repealed almost all of its rules governing the network-affiliate relationship in radio: *Network Broadcasting by Standard (AM) and FM Broadcast Stations*, 63 FCC2d 674 (1977). Over the past year, the Commission has proposed to repeal almost all of its rules regulating the network-affiliate relationship in television. See, in particular, *Programming Practices of Broadcast Television Networks and Affiliates*, 1995 FCC LEXIS 3979 (15 June 1995).

ers who promised that they would participate in station management on a full-time basis.²³ An ownership access policy, after all, would make rather less sense if owners did not involve themselves in station management and programming decisions.²⁴

Probably the clearest example of FCC reliance on assumptions about the relationship of ownership to narrative, in attempting to achieve the conditions for democratic discourse, was the agency's effort to encourage ownership of radio and television stations by minority group members. The FCC gave minority group members special, privileged opportunities to become owners, granting those groups enhanced opportunities to compete in the arena that one of us has called the 'market for loyalties'.²⁵ The Commission gave an advantage in comparative hearings to minority would-be licensees, so long as they promised to participate actively in station management; it gave other licensees facing possible revocation or non-renewal an incentive to transfer their licences to minority owners; and it established a tax certificate programme granting favourable tax treatment to any broadcaster selling its station to a minority owner.²⁶

The Commission designed these programmes in order to influence the mix of views and images presented by broadcasters,²⁷ and defended them in the Supreme Court on precisely that basis: expanded minority ownership, the Commission argued, would produce more diversity in broadcast speech. In 1990, a majority of the Supreme Court agreed.²⁸ The Court gave weight to FCC and congressional statements finding a link between expanded minority ownership and greater broadcast diversity.²⁹ It cited evidence that 'an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities', and that 'a minority owner is more likely to

²³ See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393, 395-6 (1965).

²⁴ Last year, the DC Circuit declared the FCC's focus on owner participation in station management to be arbitrary, and hence impermissible: *Bechtel v. FCC*, 10 F3d 875 (DC Cir. 1994).

²⁵ See Monroe Price, 'The Market for Loyalties: Electronic Media and the Global Competition for Allegiances', 104 *Yale LJ* 667 (1994).

²⁶ See *Minority Ownership of Broadcasting Facilities*, 68 FCC2d 979 (1978). On the tax certificate programme, see Bruce R. Wilde, Note, 'FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-Examination of Policy', 138 *U Pa. LRev.* 979 (1990).

The Commission gave women a similar preference in comparative hearings, see *Mid-Florida Television Corp.*, 70 FCC2d 281, 326 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC2d 203 (1981), but it did not include women in the distress sale or tax certificate programmes. The DC Circuit held the comparative preference for women unconstitutional in *Lamprecht v. FCC*, 958 F2d 382 (DC Cir. 1992).

²⁷ See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC2d 979 (1978).

²⁸ *Metro Broadcasting, Inc. v. FCC*, 497 US 547 (1990); see Michel Rosenfeld, 'Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality', 38 *UCLA LRev.* 583 (1991).

²⁹ 497 US at 569.

employ minorities in managerial and other important roles where they can have an impact on station policies'.³⁰ A 1995 Supreme Court decision disavowing any sort of racially-defined government preference, though, left the programme moribund;³¹ the Commission is now reconsidering all of its licensing preferences.³²

The FCC's ownership access policy had a mechanical truth to it. If one is seeking to achieve diversity in speech, a system with more owners seems better than one with fewer. The policy's assumptions, however, were incomplete. Its descriptive predicate—that a speaker's identity strongly determines the content of its speech—underestimated the flattening and homogenizing effect of the commercial market-place. In broadcast television, where the numbers of speakers in each local market have been few and each licensee has sought to attract a lowest-common-denominator mass market, broadcast offerings have been largely homogenous notwithstanding the Commission's diversity efforts. For the most part, network affiliates have simply adopted or 'cleared' network programming during prime time. Even non-network offerings have tended to vary little, in significant respect, from one speaker to the next. Broadcast television licensees, no matter how diverse, tend to choose their programming with an eye to maximizing audiences and advertising revenues.³³ In radio, the market is more fractionalized, but the likelihood is still small that any speaker speaks with a genuinely distinctive voice.

Nor has the slight racial diversity in ownership achieved by the FCC led to the kind of programme diversity with overtones important in furthering pluralist goals. At the margin, stations owned by minority groups are somewhat more sensitive to minority issues; perhaps they have better affirmative action records. But there has not been a convincing showing that, where a broadcast owner is interested in maximizing profit, the nature of the speech varies substantially with the nature of the owner.

Cable brought a different perspective to the video market. In the vast majority of US markets, the cable operator is a local monopolist. While cable television has brought many more channels to each household, each cable operator more or less controls its entire system, choosing each of the programmers that the system will carry. On the other hand, a profit-maximizing cable operator will likely seek to carry diverse programme channels in order to increase subscribers.

³⁰ *Ibid.* 580-1.

³¹ *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995).

³² See *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCCRcd. 2664 (1992), 8 FCCRcd. 5475 (1993), 9 FCCRcd. 2821 (1994). Congress has acted independently to end the tax certificate programme.

³³ See generally C. Edwin Baker, 'Advertising and a Democratic Press', 140 *UPa. LRev.* 2097 (1992); Jonathan Weinberg, 'Broadcasting and Speech', 81 *Calif. LRev.* 1101, 1152-7 (1993).

Cable operators have no day-to-day control over those programming services once they make the initial choice to carry them. (The strategy is reminiscent of the argument, long made in the context of European broadcasting but ill-tolerated at the FCC, that a single manager of frequencies will maximize audience by purposely and rationally diversifying, playing to small segments, in the way that only a monopolist can do.) Cable's programming structure thus achieves greater diversity in programme offerings at the cost of tearing a small hole in the central assumption of US concentration rules, the link between ownership of communications facilities and meaningful control over the messages conveyed by speech using those facilities.

Perhaps recognizing that shift, federal cable television regulation began to incorporate common-carrier aspects. The 1984 Cable Communications Policy Act requires larger cable systems to make leased-access channels available to unaffiliated programmers, without regard to the content of the programming the outside programmers provide.³⁴ The same Act authorizes local franchising authorities to require cable operators to provide public access channels, and channels reserved for educational or governmental use; the cable operator is forbidden to exercise editorial control over those channels.³⁵ The Federal Communications Commission promulgated 'video dialtone' rules allowing telephone companies to distribute video programming only if they established common-carrier platforms accommodating multiple outside programmers on a non-discriminatory basis.³⁶ Cable's position in the video market paved the way for a new approach to access and diversity issues, one with a role for common carrier regulation. Even the most passionate critics of FCC regulation of broadcasting conceded the legal permissibility—if not desirability—of common carrier regulation of the old and the new media.³⁷

³⁴ 47 USC § 532. The efficacy of this provision is unclear; battles continue to rage over the rates that programmers must pay for leased access. In 1992, Congress amended the statute to allow cable operators to decline to carry leased-access programming 'that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards'. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a), 106 Stat. 1460, 1486 (1992) (codified at 47 USC § 532(h)); see *Denver Area Educ. Telecom. Consortium v. FCC*, 116 S Ct 2374 (1996).

³⁵ 47 USC § 531. Congress in 1992 directed the FCC to promulgate regulations enabling cable operators to prohibit, on such channels, programming that contains 'sexually explicit conduct, or material soliciting or promoting unlawful conduct'. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992); see *Denver Area Educ. Telecom. Consortium*, n. 34 above.

³⁶ See *Telephone Company—Cable Television Cross-Ownership Rules* (Reconsideration and Third Further Notice of Proposed Rulemaking), n. 21 above. These rules were superseded by the open video system provisions of the 1996 Telecommunications Act.

³⁷ See Thomas G. Krattenmaker and L. A. Powe, Jr., 'Converging First Amendment Principles for Converging Communications Media', 104 *Yale LJ* 1719, 1737-9 (1995).

III

Today, the old approach to ownership regulation lies in ruins. It is no longer possible to think about regulation in terms of separated categories—broadcasting and telecommunications—for the transmission of information. In the new global economy, many US legislators see more need to support huge media entities that can compete internationally and contribute to a more favourable balance of payments than to ensure that minorities within the borders of the United States have their say. In the eyes of many, the new abundance of channels of communication means that government need no longer seek to ensure diverse and competing speakers.

The FCC, at the start of 1995, spurred by huge increases in the number of broadcast outlets, proposed to dismantle much of its remaining ownership regulation. It solicited comment on whether it should relax its rule forbidding ownership of two television stations in a single market, whether it should relax or even eliminate its bar on radio-TV combinations in a single market, and whether it should eliminate its numerical station limit on ownership of television stations in different markets, perhaps raising the aggregate audience reach cap as high as 50 per cent.³⁸

The FCC's proposals were overtaken by Congressional action. The Telecommunications Act of 1996 drastically overhauls broadcast ownership rules. It eliminates any national limitation on radio or television station ownership, beyond a solitary ban on control of television stations that, in the aggregate, reach more than 35 per cent of the nation's population. It sharply loosens local radio ownership rules, allowing a single entity to own five to eight commercial radio stations in a given market. It further relaxes the limits on radio-TV combinations. It eliminates the cable-broadcast cross-ownership ban. It invites more deregulation at the hands of the FCC.

What philosophy and structure does the new law supply, as it sweeps the old rules away? The law's goals are sweeping: it contemplates a world in which all Americans have access to 'high-speed, switched, broadband telecommunications capability' enabling users to 'originate and receive high-quality . . . graphics and video telecommunications'. Its drafters hope to achieve that end through a heavy dose of competition—the product of radical deregulation—and a hint of new common carrier thinking.

The Act starts by imposing a duty on local telephone companies to provide full interconnection, and non-discriminatory access, to other entities seeking to provide local telecommunications services. By re-

³⁸ *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCCRcd. 3524, 3568, 3575-8, 3580-1 (1995).

quiring interconnection, the drafters plan to subject local telephone companies to competition from cable companies and new local telecommunications providers. The Act pre-empts local-government barriers to cable companies' provision of telecommunications services.

In return for interconnection, the Act grants the telephone companies a variety of boons. First, with FCC permission, they can provide long-distance service. Indeed, the FCC may approve a telephone company's entry into the long-distance market, carrying calls originating in its local service area, even if the company is not in fact subject to competition in its local service area. It is enough that the company has filed, and the FCC and State authorities have approved, a statement of the terms pursuant to which it would offer interconnection if it received a *bona fide* request.

The statute promises telephone companies flexibility in FCC rate regulation, directing the agency to eliminate such regulation where it is not necessary to ensure just and non-discriminatory rates. It includes only weak provisions designed to ensure continuation of service to poor and rural users. It authorizes telephone companies to offer 'electronic publishing' and other information services.

Most important for purposes of this essay, the Act authorizes telephone companies to provide video programming. Telephone companies have the option of acting as traditional cable operators, subject to local franchising requirements and other regulation.³⁹ The law, though, gives telephone companies a more attractive option: they are freed from local franchising and regulation if they choose to offer programming over 'open video systems'.⁴⁰ The operator of such a system may not (once demand for carriage exceeds its channel capacity) select the programming on more than one-third of its channels, and may not discriminate among video providers with regard to carriage.⁴¹ It may not unreasonably discriminate in its own favour with regard to information provided to subscribers for purposes of selecting programming, although it may negotiate disparate contracts with unaffiliated providers 'to allow consumer access to their signals on any level or screen of any gateway, menu or program guide'. It is subject to rules, to be prescribed by the FCC, ensuring that it offers public access, and carries the signals of local broadcast stations, on terms similar to those governing conventional cable systems.

The Act appears to subject open video systems to no rate regulation at all. It removes almost all rate regulation of conventional cable television service by 31 March 1999.

³⁹ Under most circumstances, however, a local telephone company can buy no more than 10% of an existing cable company in its service area.

⁴⁰ The operators of such systems, however, can be required to pay fees to local governments in lieu of cable franchise fees.

⁴¹ The statute leaves it to the FCC to devise the process by which the system's remaining channels are to be programmed.

IV

This legislation reflects a marked shift in philosophy. The old rules were based on the assumption that diversity of ownership, both in terms of the number of owners and the kinds of owners, would mean diversity of views. They presupposed a government role in ensuring a large and diverse set of speakers. The new rules experiment with a breakdown of the link between content and conduit; they suggest a role for some sort of common carrier regulation. They otherwise seek to replace regulation with competition as the engine of diversity.

A variety of different changes have come together here. In part, the shift in federal law derives from changes in ideology. Over the last twenty years, a fervour for the workings of the market has overtaken a commitment to federal intervention. Aside from regulation of sexually explicit speech (where intrusive regulation is increasingly in vogue), policymakers now impose a far heavier burden of proof on those who would justify regulatory controls. The FCC has so favoured deregulation that none of the traditional restrictions, including those on cross-ownership, have seemed secure. The idea that there should be special efforts to encourage minority voices in the media now is relegated to the dustbin of history. Worries that no media company should be too large have given way to ideas that bigness is valuable. Scholars who long argued that vertical integration, e.g. between cable operators and video programme services was not as important as horizontal integration have prevailed, and even horizontal integration is no longer out of the question.

This deregulatory fervour has been matched by a shift in First Amendment thinking, emphasizing limits on government's ability to prescribe market barriers and market structure. By the mid-1990s, it was common for judges to hold that the First Amendment right to speak protected not only individuals and newspapers, not only broadcasters, but also cable systems and telephone companies. Laws that precluded telephone companies from providing video service suddenly were cast into constitutional doubt.

Ideology and constitutional law aside, an obvious source of regulatory change was change in technology. Technological changes brought about the so-called 'end of scarcity': the creation of seeming abundance in channels of distribution. Beyond that, they made regulatory market segmentation increasingly artificial and increasingly inefficient. Vertical integration of distribution services and programming services proceeded rapidly in the 1980s. Broadcast and cable properties came under common ownership (though, by law, not in the same market). Because of these new styles of building businesses, federally enforced cartelization—separating telephony, cable, broadcast, and newspapers—no longer enjoyed private support. The large players

wanted to acquire or be acquired; they saw federal restrictions as obsolete.

The technological changes also mean that the United States cannot make policy for the electronic media in isolation from the rest of the world. We have seen global shifts in the structure of telecommunications carriers and video providers. Dissolving federal regulation is now seen as a method of increasing the power of one of America's major contributors to a favourable balance of payments. Entertainment is so important an export, in terms of economics and international politics, that the Congress and the government are inordinately inclined to help the industry position itself to dominate the world market. More generally, the increasingly global nature of the communications market-place is forcing a global harmonization of communications rules. It would be impossible, over time, to maintain an equilibrium in which companies with global pretensions have markedly different structures in America and throughout the world.

Section 4(2) Postponement Orders: Media Reports of Court Proceedings under the Contempt of Court Act 1981

IAN CRAM*

1. Introduction

The scope of the present article is to review the operation of section 4(2) of the Contempt of Court Act 1981 which allows a court to order the postponement of media reports of court proceedings. Undoubtedly a less draconian measure than others which prohibit publication at any point in the future,¹ it should however be remembered that, in a context in which the instantaneous transmission of information is highly prized, news postponed often ceases to be news at all, hence the seriousness with which the media regard such restrictions. It is not intended in the present discussion to provide a survey of other statutory and common law controls over media reports of open court proceedings which today heavily qualify the principle of open justice enunciated by the House of Lords in *Scott v. Scott* [1913] AC 417.² Instead, attention will be focused upon judicial regulation of the conflict between free speech interests and those of fair trial and the proper administration of justice when it is alleged that unfettered reporting of on-going court proceedings will cause prejudice to those proceedings or others which are pending or imminent.

This chapter begins by analysing the common law prior to the 1981 Act. The form and subsequent interpretation of section 4(2) are then examined. Attention is later given to some important procedural issues which emerged once the power of postponement began to be used. One of my main contentions in respect of developments in England and Wales will be that, while some evidence exists

* Leeds University.

¹ See e.g. the Contempt of Court Act 1981, s. 11. At the time of writing, it is reported that the Home Secretary is proposing to prohibit the reporting of 'false' or 'irrelevant' allegations made by barristers during speeches of mitigation after a defendant has been found guilty: *The Times*, 18 Nov. 1995.

² For a commentary on reporting restrictions generally, see A. Nicol and H. Rogers in *The Yearbook of Media and Entertainment Law 1995* (e.g. M. Barendt, S. Bate, J. Dickens, and J. Michael (eds.)) (Clarendon, Oxford, 1995) 295-310. Also G. Robertson and A. Nicol, *Media Law* (3rd edn., Penguin, Harmondsworth, 1992), ch. 7. On s. 4(2) see M. Beloff, 'Fair Trial—Free Press? Reporting Restrictions in Law and Practice' [1992] *PL* 92.